No. 14908

In the United States Court of Appeals for the Ninth Circuit

PANCHO BARNES, also known as FLORENCE LOWE BARNES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Miscellaneous:

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b) (R. 3).[1] The judgment dismissing the action

[1] In her brief (pp. 2, 7) appellant alleges that "the action was brought under and by virtue of the Tucker Act, 28 U.S.C.A. § 1346." The Tucker Act is the popular name for the Act of March 3, 1887, 24 Stat. 505, providing for the bringing of suits against the United States "in cases not sounding in tort." The jurisdictional

was entered April 12, 1955 (R. 12-13), and notice of appeal was filed June 9, 1955 (R. 13-15). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether an action under the Federal Tort Claims Act was properly dismissed as failing to state a claim on which relief could be granted when the gravamen of the action was the continuous trespasses of government employees amounting to a "taking" of real property, and when an action was subsequently instituted by the United States to acquire fee simple title to the property involved.

2. Whether the refusal of the trial judge to disqualify himself constituted prejudicial error.

STATEMENT

Invoking jurisdiction under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b), appellant prayed for judgment against the United States in the amount of $1,500,000 (R. 3, 5). In her amended complaint she alleged that at all pertinent times she was the owner and operator of certain property in Kern County, California, "consisting of a guest ranch, hotel, restaurant, bar, dance hall, rodeo grounds, swimming pool, racetrack, hog, cattle and horse business, and airport business" (R. 4-5). She stated her cause of action as follows (R. 3-4):

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provisions of the Tucker Act with respect to the Court of Claims are now codified in 28 U.S.C. sec. 1491, while the grant of concurrent jurisdiction to the district courts in cases of claims not exceeding $10,000 appears in 28 U.S.C. sec. 1346(a)(2). Appellant's complaint seeking recovery of $1,500,000 did not invoke jurisdiction under the Tucker Act but specifically referred to 28 U.S.C. sec. 1346(b).

On December 7, 1941, the plaintiff's airport was closed by order of the United States Government. Said airport was used by the Government. After the other airports were opened in 1943, plaintiff's airport was kept closed. After the West Coast Defense Command approved the opening of plaintiff's airport, an order came through from Washington to keep plaintiff's field closed. Plaintiff succeeded through drastic action in the opening of her airport in October, 1945. However the Air Corps and later the Air Force used every means to hamper the plaintiff's business and have succeeded in keeping her business from attaining a fraction of its natural growth and used drastic and illegal means so to do. Continuously without cessation the Air Force and/or their agents have harassed the plaintiff and have tried and have ultimately succeeded in gaining illegal control of her property and have violated her Constitutional rights under the V Amendment. There has been a continuous tort committed against the plaintiff resulting in a partial taking or inverse condemnation of plaintiff's property and damage to her business. This complaint is not to be confused with the actual and illegal condemnation suit filed by the government but is for damages in addition to any damages arising from said condemnation suit and the price of the property involved should the plaintiff consent to eventually settle amicably with the United States Government on the condemnation suit and damages accrued therefrom.

The condemnation suit referred to by appellant was filed on February 27, 1953, to acquire the fee simple

title to her property in connection with the expansion of the Edwards Air Force Base, and a declaration of taking was filed on the same day. See *McKendry* v. *United States,* 219 F. 2d 357 (C.A. 9, 1955). Appellant's original complaint in this case was filed December 3, 1952 (R. 14), and her amended complaint was filed February 28, 1955 (R. 5).

The Government moved to dismiss the action on the grounds of lack of jurisdiction and failure to state a claim upon which relief could be granted (R. 5-7). The motion was noticed for hearing on April 4, 1955 (R. 5-6), but was reset for hearing on April 1, 1955, by the Honorable Leon R. Yankwich, Chief Judge, on his own motion (R. 7-8). On March 30, 1955, appellant filed an affidavit of bias and prejudice seeking the disqualification of Judge Yankwich (R. 8-11).

After hearing, appellant's oral motion for the disqualification of Judge Yankwich was denied, and her affidavit was ordered stricken as legally insufficient and scandalous (R. 11-12, 22-30). At the same time the court granted the Government's motion to dismiss the action on the ground that the complaint did not state a claim against the United Sates, and that, if it did state a claim for some kind of trespass, the acquisition of the property through condemnation put an end to the action (R. 39). An order dismissing the action was entered April 12, 1955 (R. 12-13), and this appeal followed (R. 13-15).

ARGUMENT

I

An Action Under the Federal Tort Claims Act Was Properly Dismissed When the Gravamen of the Action Was the Continuous Trepasses of Government Employees Amounting To a "Taking" and When a Proceeding To Condemn the Property Involved Was Subsequently Filed

As appellant confesses (Br. 6), her amended complaint "is indefinite in that it fails specifically to state the nature of the activities of the Government of which complaint is made and to state the period of time during which said activities took place." However, the amended complaint is not so indefinite that, with the aid of appellant's own interpretation of it, it does not clearly appear that the action was properly dismissed.

In the first place, it is abundantly clear that appellant's asserted cause of action is based in part upon the alleged closing of her airport and the use thereof by the Government during the period from the attack on Pearl Harbor in 1941 to 1945 (R. 3-4, 35-36; see Appellant's Br. 3). Obviously, this alleged wartime use of her airport by the Government was a completed transaction by 1945, so that by the time of the filing of her initial complaint on December 3, 1952, the usual six-year limitations period for commencing actions against the United States (28 U.S.C. sec. 2401(a)) had expired, to say nothing of the two-year limitations period for the filing of actions on tort claims (28 U.S.C. sec. 2401(b)). Hence, in this respect, at least, the action was properly dismissed. And the action as a whole was properly dismissed for reasons which will now appear.

Appellant's theory is that her complaint raises a

question of "continuous inverse condemnation,[2] or a continuous taking of that property" (R. 37; see also R. 4, 35; Br. 3). She has further stated (R. 37), "* * * it may have been an implied contract legally, but it certainly wasn't intended as such; it was intended simply as the taking of the property." Thus, we have in appellant's own words the admission that the dismissed action[3] was one for the "taking" of property, and as further support for this reasoning we have her present reliance (Br. 7-8) upon the Tucker Act, 28 U.S.C. sec. 1346(a)(2), which was not invoked in her amended complaint. See, *supra,* p. 1, fn. 1. However, neither the Tucker Act, nor the Tort Claims Act (28 U.S.C. sec. 1345(b)), which was invoked by appellant (R. 3), affords any basis for appellant's action.

It cannot at this date be denied, and appellant recognizes (Br. 8), that the Government may "take" property in the exercise of the power of eminent domain without formal condemnation proceedings, and that in such event the landowner's remedy is a suit under the Tucker Act on the theory of implied contract, the recovery being the same as though a condemnation pro-

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[2] In *State of California* v. *United States District Court,* 213 F.2d 818, 821, fn. 10 (1954), this Court has defined "inverse condemnation" as follows:

> The term "inverse or reverse condemnation" contemplates the situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made.

[3] It should be noted that at the time this action was pending in the district court, another tort claims action by appellant (No. 1146) was also pending, and the Government's motions to dismiss both actions were heard at the same time (R. 30). In No. 1146 the Government's motion to dismiss was granted as to one count and denied as to another (R. 32-35, 40). No. 1146 is still pending in the district court.

ceeding had been filed. *Campbell* v. *United States,* 266 U. S. 368, 370-371 (1924); *Hurley* v. *Kincaid,* 285 U. S. 95, 103-105 (1932); *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 21-23 (1940); *Causby* v. *United States,* 328 U. S. 256, 267 (1946). However, the Tucker Act is of no assistance to appellant here, not only because she did not invoke it in her complaint, but also because the jurisdiction of the district court in such cases is limited to claims not exceeding $10,000 (28 U.S.C. sec. 1346(a)(2)), whereas her claim is in the amount of $1,-500,000 (R. 5).

Appellant's reliance upon the Federal Tort Claims Act is also unavailing. If there were a lawful taking prior to the filing of the condemnation action, the acts of the government agents could not be "wrongful," so that there could be no basis for an action in tort. If, on the other hand, the acts of the Government's agents, relied upon by appellant as constituting an attempted taking, were in fact unauthorized and therefore tortious in the beginning, they have been subsequently ratified and adopted as governmental acts by the filing of the condemnation proceeding and even prior thereto by the Acts of Congress authorizing the taking.[4] *Shoshone Tribe* v. *United States,* 299 U. S. 476, 495-496 (1937);

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[4] The Act of August 12, 1935, 49 Stat. 610, as amended by the Act of July 26, 1947, 61 Stat. 495, 500, 503, 10 U.S.C. secs. 1343(a), 1343(b) and 1343(c), authorizes the Secretary of the Air Force to acquire lands for the enlargement or alteration of existing air bases, as well as for the establishment of new bases. The Acts of June 17, 1950, 64 Stat. 236, 242, 244, and September 6, 1950, 64 Stat. 595, 748, appropriated moneys and authorized the acquisition of land for the expansion of the base here involved. See also the Act of September 28, 1951, 65 Stat. 336, 339, 361; Act of August 7, 1953, 67 Stat. 440, 449; Act of July 27, 1954, 68 Stat. 535, 557; Act of July 15, 1955, 69 Stat. 324, 342.

Crozier v. *Krupp,* 224 U. S. 290, 305 (1912). As stated in the *Crozier* case:

> The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.

Hence, it is submitted that even if the acts of government agents complained of by appellant were originally tortious by reason of being unauthorized, they will no longer support a suit under the Federal Tort Claims Act. Appellant may obtain all the relief to which she is entitled in the pending condemnation proceeding. For there was only one taking, whether that took place prior to the filing of the condemnation action or as a result thereof. There were not two takings, as appellant conceives the situation (R. 39), "once over a period of years in small parts, and eventually altogether at a different price." Cf. *United States* v. *General Motors Corp.,* 323 U.S. 373, 382 (1945). And the date of taking is subject to determination in the condemnation proceeding and will determine the date of valuation and other rights. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 494-497 (1937); *United States* v. *Rogers,* 255 U.S. 163, 167-169 (1921), where the "taking" was in 1912 and the condemnation proceeding was not brought until 1915; *Bank of Edenton* v. *United States,* 152 F. 2d 251, 253-254 (C.A. 4, 1945); *11,000 Acres of Land, etc.* v. *United States,* 152 F. 2d 566, 568 (C.A. 5, 1945), certiorari denied, 328 U.S. 835; cf. *United States* v. *Lynah,* 188 U.S. 445, 470 (1903); *Woodville* v. *United*

States, 152 F. 2d 735, 738 (C.A. 10, 1946), certiorari denied, 328 U.S. 842.

Moreover, in view of the statutory authority to acquire lands for the enlargement of the Edwards Air Force Base (see fn. 4, p. 7, *supra*), it would appear that jurisdiction to adjudicate claims based upon the alleged tortious conduct of government employees in attempting to gain control of appellant's land was barred by the exceptions in 28 U.S.C. sec. 2680(a).[5] No negligence is alleged, so that, in addition to the "discretionary function" exception, the exception of claims based on the execution of a statute would be applicable. *Dalehite* v. *United States,* 346 U.S. 15, 24-36 (1953); *Coates* v. *United States,* 181 F. 2d 816 (C.A. 8, 1950). As the Court said in the *Dalehite* case (346 U.S. at p. 33) with respect to that exception:

> The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars test by tort action of the legality of statutes and regulations.

And as stated in the House Report, quoted in the *Dalehite* case (346 U.S. at pp. 29-30), the exception precludes "any possibility that the bill might be construed to authorize suits for damages against the Gov-

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[5] Section 2680(a) provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or any employee of the Government, whether or not the discretion involved be abused.

ernment growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious."

II

The Refusal of the Trial Judge To Disqualify Himself Did Not Constitute Prejudicial Error

Defending the judicial impartiality of Judge Yankwich in this Court would, in our opinion, be tantamount to "carrying coals to Newcastle." Hence, the Government's argument under this point will be limited to the following:

First, the facts related in appellant's affidavit (R. 9-10), particularly the refusal of Judge Yankwich to speak to appellant in chambers, do not in any sense establish personal bias against her. *Ex parte American Steel Barrel Co.,* 230 U.S. 35, 43-44 (1913); *Price* v. *Johnston,* 125 F. 2d 806, 811-812 (C.A. 9, 1942), certiorari denied, 316 U.S. 677; *Beecher* v. *Federal Land Bank,* 153 F. 2d 987, 988 (C.A. 9, 1945), certiorari denied, 328 U.S. 871; *Ferrari* v. *United States,* 169 F. 2d 353, 354-355 (C.A. 9, 1948); *Lowe's, Inc.* v. *Cole,* 185 F. 2d 641, 646 (C.A. 9, 1950), certiorari denied, 340 U.S. 954; *Tucker* v. *Kerner,* 186 F. 2d 79, 83-84 (C.A. 7, 1950).

Secondly, appellant's affidavit was a nullity and entitled to no consideration since it was not, as required by the statute (28 U.S.C. sec. 144), "accompanied by a certificate of counsel of record stating that it is made in good faith." *Morse* v. *Lewis,* 54 F. 2d 1027, 1032 (C.A. 4, 1932), certiorari denied, 286 U.S. 557; *Beland*

v. *United States,* 117 F. 2d 958, 960 (C.A. 5, 1941), certiorari denied, 313 U.S. 585; *Mitchell* v. *United States,* 126 F. 2d 550, 552 (C.A. 10, 1942), certiorari denied, 316 U.S. 702, rehearing denied, 324 U.S. 887; *United States* v. *Onan,* 190 F. 2d 1, 6-7 (C.A. 8, 1951), certiorari denied, 342 U.S. 869.

Finally, even if it could possibly be held that the district court erred in refusing to disqualify himself, this could not lead to a reversal of the judgment, since, as we have shown (*supra,* pp. 5-10), the action was in any event properly dismissed. 28 U.S.C. sec. 2111; Rule 61, F.R.C.P.

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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